

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company (“Union Pacific”) submits these comments in response to the Surface Transportation Board’s Notice of Proposed Rulemaking served on September 7, 2023. *See Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (“NPRM”). In the NPRM, the Board has proposed a new rule providing for the prescription of reciprocal switching to address “inadequate rail service.”

Union Pacific is committed to providing industry-leading service to our customers. Union Pacific believes temporary reciprocal switching should be available as a remedy to customers harmed by inadequate service if an alternate carrier could provide a superior service without compromising safety or service to other customers. However, Union Pacific has significant concerns regarding the NPRM’s proposed “objective standards” for identifying inadequate service and certain other features of the proposed rule.

The Association of American Railroads (“AAR”) is filing comments addressing concerns about features of the proposed rule that could make reciprocal switching available when it is not justified and require it to continue for longer than can be justified. Union Pacific endorses and joins in the comments filed by the AAR.

Union Pacific is filing these separate comments to address a few specific points:

- *First*, the Board’s “objective standards” proposed in the NPRM for identifying “inadequate service” are based on a misunderstanding of the performance data Union Pacific submits in *Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (Sub-No. 1) (“EP 770-1”), and there are important issues and adjustments to consider if the Board moves forward with an effort to develop a standards-based approach.
- *Second*, the Board’s proposed rule can and should do more to encourage voluntary resolution of service issues.
- *Third*, the Board did not adequately consider the burdens its proposed rule imposes on “alternate carriers,” but targeted revisions to the rule can address these practical considerations.
- *Fourth*, the Board underestimates the cost and time burden on Union Pacific to develop the new data reporting methodologies that would be required to implement the proposed rule, and Union Pacific and other carriers should be allowed sufficient time to comply with the requirements of any new rule.

Each concern is discussed in more detail below.

I. The Board proposes performance standards that do not align with the data Union Pacific submits in EP 770-1.

The proposed rule’s central feature is its three proposed performance standards the Board says are grounded in performance data Union Pacific and other carriers submitted in EP 770-1. *See* NPRM at 15, 20. However, the Board proposes methods for measuring the performance standards that are significantly different from the methods Union Pacific used to calculate the data submitted in EP 770-1. As a result of this mismatch, the Board cannot rely on Union

Pacific's EP 770-1 data to justify the proposed performance standards or to evaluate the impact of adopting the rule on Union Pacific or the rail transportation policy in 49 U.S.C. § 10101.¹

A. Service Reliability (OETA) Standard.

The first proposed standard would measure a rail carrier's "service reliability" based on the carrier's success in delivering shipments within 24 hours of their "original estimated time of arrival," or "OETA." NPRM at 13. The proposed rule would require a carrier to provide a shipper an OETA "when the shipper tender[s] the bill of lading for shipment." *Id.* The OETA would later be compared to the time the car was delivered to the designated destination. *Id.* Application of the OETA standard would be based on all shipments in a given lane over 12 consecutive weeks. *Id.* Relying on data Union Pacific and other carriers submitted in EP 770-1 reflecting trip plan compliance ("TPC") for manifest traffic for the week ending May 13, 2022, the NPRM proposes to set the OETA standard at 60%. *Id.* at 15. In other words, a carrier would fail the OETA standard if less than 60% of shipments in a lane arrived within 24 hours of the OETA over a 12-week period.

For two equally important reasons, the Board cannot not rely on Union Pacific's TPC data reported in EP 770-1 to determine that failing to meet the NPRM's proposed OETA standard constitutes inadequate service.

First, Union Pacific's EP 770-1 TPC data do not help the Board understand either the level of on-plan service customers require to avoid suffering harm or the practical implications of adopting the proposed standard. Union Pacific's TPC data reported in EP 770-1 simply reflect

¹ Because Union Pacific's existing data were not aggregated and analyzed using the methods proposed by the Board, the amount of data involved is substantial, and the programming challenges that would have to be overcome to implement the Board's proposed methods for measuring compliance with the proposed standards are also substantial, Union Pacific cannot quantify the impact of the methodological differences or the impact of adopting the proposed standards on Union Pacific within the time provided under the procedural schedule.

Union Pacific's system-wide TPC for manifest traffic over a one-week period. Statistics showing Union Pacific's one-week, system-wide TPC was 63% do not provide any basis for concluding all or any manifest shippers would suffer harm if they do not receive service that meets the NPRM's proposed 12-week, lane-specific, OETA-based 60% standard.

Further, the highly aggregated TPC data reported in EP 770-1 do not provide any basis for evaluating the amount of traffic that would be affected by a 60% OETA standard. System-wide on-plan performance of 63% could reflect conditions in which: (a) shipments in each individual lane are on-plan 63% of the time, so no traffic would be subject to reciprocal switching; (b) shipments in lanes with 10% of all traffic are always on-plan, and shipments in lanes with 90% of all traffic are on-plan 59% of the time, so 90% of traffic would be subject to reciprocal switching; or (c) a wide variety of other combinations and permutations, each presenting implications for the proposed rule's impact.

Using one week of system-average data to develop a service standard becomes even more concerning when one considers the effect of the proposed 12-week evaluation period.² Strictly applying a 12-week evaluation period means short-term events and small numbers of movements could have an outsized impact. Especially for lower volume customers, during the 12-week period, just a few service-challenged weeks could be enough to outweigh 40 weeks of perfect service.³ Aggregated statistics reflecting a single-week sample period are not sufficient to analyze the potential impact of the proposed OETA standard on a specific customer.

² The NPRM does not indicate whether a 12-week period could begin on any day, such that there would be 365 potential 12-week evaluation periods each year, or whether each week would run from, say, Monday to Sunday, so there would be 52 potential 12-week evaluation periods each year.

³ For example, under the proposed rule, a customer that ships 20 cars per week for 40 weeks at a 100% on-plan level, then 5 cars per week during a 12-week period at a 59% on-plan level, could (continued...)

In sum, if the Board wants to develop an “objective standard” for defining “inadequate service” based on on-plan performance, it cannot rely on a quick look at one week of system-average data to select the performance standard.

Second, the calculation proposed in the NPRM for the OETA standard does not align with the methods used to calculate Union Pacific’s TPC data. The differences include: (a) the event that triggers Union Pacific’s development of the estimated time of arrival (or estimated time of interchange); (b) how Union Pacific addresses various en route events; (c) the point in time when Union Pacific deems a car delivered in interchange; and (d) how Union Pacific addresses delivery to “order in” customer facilities.

Development of the estimated time of arrival (or interchange) for TPC. For single-line traffic and traffic Union Pacific interchanges to another carrier, Union Pacific’s TPC for manifest traffic measures a car’s compliance with an estimated time of arrival or estimated time of interchange that Union Pacific develops when the shipper *releases the car to Union Pacific*. Tender of a car’s bill of lading does not indicate to Union Pacific the car is ready for pick up; it is the customer’s release of the car that triggers action by Union Pacific, since tender of a bill of lading can precede the release of the car. An estimated time of arrival developed based on the customer’s release provides more reliable information for measuring service performance.

The proposed OETA standard would measure compliance with an estimated time of arrival a carrier must create “when the shipper tender[s] the bill of lading for shipment.” NPRM at 13. Thus, the OETA standard would require Union Pacific to adopt a different arrival-time estimate than it currently uses to measure TPC. Stated differently, there are no data reported by

obtain two to four years of reciprocal switching, despite enjoying on-plan service for 97% of shipments.

Union Pacific in EP 770-1 that measure on-plan performance using the OETA standard proposed by the Board. If the Board adopts an OETA standard, then to keep the focus on carrier service issues, a car's compliance should be based on an estimated time of arrival the carrier creates when the customer releases the car.

Adjustments for en route events for TPC. In assessing a car's compliance with its trip plan, Union Pacific's TPC measure for manifest traffic adjusts for the impact of various events that delay or change a car's arrival time but are not caused by Union Pacific service issues. These are events that simply cannot be predicted when the car is tendered for shipment. Nor are these real-world events addressed by the limited "extraordinary circumstances" referenced in the NPRM as potential "affirmative defenses." See NPRM at 41 (proposed § 1145.3(a)). For example, when an estimated time of arrival is calculated at car release, Union Pacific has no way to predict whether the car will be bad-ordered en route, or if the customer will instruct Union Pacific to reroute a car to a different destination. These are just two examples of many common events in providing rail service that are unpredictable at the outset of a specific shipment. Union Pacific accounts for these types of common-yet-unpredictable events by "stopping the clock" for TPC. Union Pacific develops a new estimated arrival time and combines the original and new trip plans to measure TPC. The Board's proposed OETA standard does not account for the common-yet-unpredictable en route events. Adjusting for events outside of the control of Union Pacific is critical to understand where Union Pacific can focus its attention to improve service. If the Board adopts an OETA standard, then to keep the focus on carrier service issues, the methodology should incorporate adjustments to exclude time lost to non-service-related en route events.

Definition of the time of interchange for TPC. When Union Pacific interchanges traffic with another carrier, Union Pacific’s TPC measure for manifest traffic measures compliance with an estimated time of interchange that Union Pacific develops based on its plan to *deliver the car in interchange*—that is, when it expects to send the subsequent rail carrier an electronic message alerting the carrier it has delivered the car. Delivery in interchange typically occurs when Union Pacific moves the car past a designated automatic equipment identification reader or places the car on a designated interchange track, depending on the specific interchange location involved. By contrast, the proposed OETA standard would measure a car’s compliance with an estimated time of interchange based on “when the subsequent carrier acknowledges physical receipt and control of the shipment.” NPRM at 17.⁴ In Union Pacific’s experience, receiving carriers do not acknowledge physical receipt and control of a car at the same time Union Pacific considers the car to be delivered in interchange. Indeed, a car can potentially sit on an interchange track for several days after delivery and before the subsequent carrier acknowledges receipt. Because Union Pacific cannot control when the subsequent carrier will acknowledge receipt, an estimated time of interchange based on an acknowledgment of receipt would necessarily be less accurate than one based on delivery in interchange. If the Board adopts an OETA standard for traffic that is interchanged, then when addressing the originating carrier’s service, a car’s compliance with the originating carrier’s estimated time of interchange should be based on when the originating carrier delivers the car in interchange, not when the receiving carrier acknowledges physical receipt and control of the shipment.

⁴ The NPRM’s definitions relating to interchange appear inconsistent. In proposed § 1145.1, the NPRM defines “Delivery” in the case of shipments at interchange locations to mean “when the receiving carrier acknowledges receipt of a shipment.” NPRM at 36. However, the NPRM also defines “Receipt of a shipment” to mean “when the preceding rail carrier provides a time stamp or rail tracking message that the shipment has been delivered to the interchange.” *Id.* at 37.

Definition of delivery at customer facility for TPC. For traffic Union Pacific delivers to customer facilities, Union Pacific’s TPC measure for manifest traffic measures compliance based on when the car is delivered to the customer facility, regardless of whether a car spends time in constructive placement. For “order in” customers—customers who by prior agreement have Union Pacific hold cars in serving yards pending the recipient’s request for delivery—Union Pacific essentially “stops the clock” during the time a car spends in constructive placement for purposes of measuring TPC. If “spot on arrival” customers—customers with facilities where rail cars may be placed without placement instructions—cannot accept delivery when their cars arrive, Union Pacific puts the cars into a hold status then adjusts the time of arrival when the car is released from that status. Union Pacific’s TPC calculation method reflects the customer’s role in the delivery schedule and the full journey of the rail car. By contrast, the proposed OETA rule would require Union Pacific to create a new end point in the data measurement—constructive placement as constituting “delivery” in some circumstances. NPRM at 36 (proposed § 1145.1, defining “Delivery”). If the Board adopts an OETA standard, it needs to modify the proposed definition of “Delivery” to conform to Union Pacific’s practice or recognize the difference is another reason Union Pacific’s TPC data cannot be used to inform its proposed standard.

B. Service Consistency (Transit Time) Standard.

The second proposed standard would measure a rail carrier’s “service consistency” based on the carrier’s average transit time for shipments in a particular lane during a 12-week period. *See* NPRM at 17. Under the proposed rule, “transit time” would mean the time between “the shipper’s tender of the bill of lading and the rail carrier’s delivery of the shipment,” measured using the same approach “as for purposes of the service reliability (OETA) standard.” *Id.* The Board would determine a carrier’s compliance with the transit time standard “by comparing (A) the average transit time for shipments over a period of 12 consecutive weeks to (B) the

average transit time for the same shipment over the same 12-week period during the previous year.” *Id.* at 18. Based on the Board’s “understanding of the rail network and available data,” the NPRM proposes setting the transit time standard at either 20% or 25%. *Id.* In other words, under the proposed rule, a carrier would fail the transit time standard if the average transit time for a shipment increased by either 20% or 25% over the average transit time for the same 12-week period during the previous year. *See id.*

Union Pacific does not report transit time data in EP 770-1.⁵ Even if Union Pacific had reported transit time data in EP 770-1, the Board would face the same types of data mismatch issues discussed above in connection with the proposed OETA standard, as Union Pacific’s TPC measurement is fundamentally different from the proposed OETA standard. Union Pacific does measure and analyze transit times on a lane-by-lane basis for some limited purposes. However, Union Pacific does not calculate transit times in the same way the NPRM proposes to calculate transit times. For example, when Union Pacific measures transit times in the ordinary course of business, its calculations begin with the car’s release, not the shipper’s tender of the car’s bill of lading. For traffic Union Pacific interchanges with another carrier, its transit time “ends” when it delivers the car in interchange, not when the subsequent carrier acknowledges physical receipt. In addition, Union Pacific “stops the clock” on its transit time calculations to account for certain en route events, such as bad orders—adjustments the Board’s proposed transit time standard does not appear to contemplate. To avoid distorting results, transit time calculations in a year-over-

⁵ Union Pacific is not clear on what “data” the NPRM is referencing in the statement that the Board based the proposed transit time standard on “available data.” NPRM at 18. Union Pacific is not aware of any data that would provide any basis for concluding that all or any shippers would be harmed by a 20% or 25% increase in year-over-year transit time in any lane in any 12-week period.

year comparison should be route-specific, unlike the Board’s proposal to focus on origin-to-destination “lanes” without regard to actual routing. *See* NPRM at 39 (proposed § 1145.2(c)(1)).

Moreover, short-term increases in transit time may indicate a railroad is experiencing service issues, but explanations for year-to-year increases are usually benign. Transit times in a lane often change from year to year not because of short-term challenges to service consistency, but because of longer-term changes in traffic volumes or changes to operating plans in response to broader market conditions or specific customer requirements. In addition, when multiple shippers experience volume growth at the same time—as when economic conditions shift favorably—the process of hiring and training new crews and otherwise adjusting operations to meet and respond to new and increased customer demands can take several months, regardless of how well the railroad has been operating: the Board’s suggestion that a 12-week warning from shippers should be sufficient is simply unrealistic. If the Board adopts a transit time standard, it should make clear it will consider all relevant facts in any proceeding triggered by a carrier’s failure to meet the transit time standard.

C. Local Service (ISP) Standard.

The third proposed standard would measure a rail carrier’s “local service” based on its success in performing local deliveries and pick-ups of loaded railcars and unloaded private or shipper-leased rail cars during planned service windows. *See* NPRM at 19. Under the proposed rule, a carrier would fail the industry spot and pull (“ISP”) standard if its success rate falls below 80% over a period of 12 consecutive weeks. *See id.* The success rate would be the percentage of planned service windows during which the carrier successfully completed requested placements or pick-ups. *See id.* The carrier would be deemed to have “missed” a service window if it did not place or pick up *all* the cars requested. *See id.* According to the NPRM, the proposed 80% standard was “informed by data submitted in Docket No. EP 770 (Sub-No. 1)” by Union Pacific

and other carriers regarding industry spot and pull statistics for the week ending May 13, 2022.
Id. at 20.

For two equally important reasons, the Board cannot rely on Union Pacific's ISP data reported in EP 770-1 to determine that failing to meet the NPRM's proposed ISP standard constitutes inadequate service.

First, Union Pacific's ISP data reported in EP 770-1 reflect Union Pacific's system-wide ISP for manifest traffic over a one-week period. Statistics showing Union Pacific's one-week, system-wide ISP was 91% do not provide any basis for concluding all or any manifest shippers would suffer harm if they do not receive service that meets the NPRM's proposed 12-week, customer-specific, ISP-based 80% standard. Such highly aggregated statistics do not provide a basis for evaluating the consequences of adopting an 80% standard.

Second, the Board cannot rely on Union Pacific's reported data to develop the NPRM's ISP standard.⁶ When Union Pacific calculates its ISP performance—for purposes of EP 770-1 and in the ordinary course of business—it does not calculate ISP in the same way the NPRM proposes to calculate ISP. Most significantly, (a) Union Pacific calculates “misses” on a car event-by-car event basis, not an “all-or-nothing” basis; (b) Union Pacific's calculations exclude “misses” when customer behavior prevents planned service; and (c) Union Pacific's calculations are based on a very different approach to “service windows” than the approach described in the proposed rule.

⁶ Because of the methodological mismatches, Union Pacific does not have the data to understand the impact of the proposed ISP standard, or whether the proposed standard is an appropriate measurement of service. Union Pacific's data submitted in EP 770-1 are not aligned with the Board's proposed standard.

Union Pacific's car event-by-car event approach for ISP. When Union Pacific calculates ISP, it uses a car event-by-car event approach. For example, if a customer asks Union Pacific to spot 10 cars, and Union Pacific spots 9 cars, Union Pacific reports the success rate as 90%. And the customer would not view delivery of 9 cars as a complete failure—it would have 9 of the 10 cars that it ordered. However, under the Board's proposed ISP standard, the Board would treat Union Pacific as though it failed to deliver a single car and assign a success rate of 0%. Union Pacific's car event-by-car event approach to calculating ISP better reflects customer needs and expectations, and any rule that includes an ISP standard should use a car event-by-car event approach.

Accounting for customer behavior for ISP. Even if the Board were to adopt Union Pacific's car event-by-car event approach to calculating ISP, it still could not rely on Union Pacific's ISP data submitted in EP 770-1. Union Pacific's ISP calculations account for customer behaviors that prevent Union Pacific from providing industry switching. Union Pacific excludes cars impacted by circumstances outside Union Pacific's control from both the numerator and denominator when calculating its success rate.⁷ Adjusting for events outside of the control of Union Pacific is critical to improving service, by highlighting the most relevant information. The Board cannot rely on Union Pacific's reported data to develop its proposed ISP standard because the Board's approach to measuring ISP would treat as "misses" certain events Union Pacific appropriately excludes from its calculations when reporting data in EP 770-1. If the

⁷ For example, Union Pacific does not consider a railroad service failure to have occurred when it is unable to complete a delivery or a pick up because a customer failed to submit the waybill, a customer's gate is locked, extra work added by a customer, or a customer's track is otherwise blocked.

Board adopts an ISP standard, then to keep the focus on carrier service issues, the methodology should incorporate adjustments to exclude to “misses” caused by customer behaviors.⁸

“Service windows” for ISP. When Union Pacific calculates ISP, it measures “success” based on whether it spots or pulls the car within 8 hours of the time the local train scheduled to perform the switching is scheduled to serve the customer.⁹ The Board is proposing an entirely different approach to measuring success. Rather than focus on whether local trains successfully operate on or close to schedule, the proposed ISP standard would require use of fixed “service windows” triggered by the beginning of the local crew’s “work shift.” NPRM at 38. The methodological mismatch is yet another reason Union Pacific’s reported data are not an appropriate basis for the proposed ISP standard.

* * *

In 1998, the Board said it did “not believe that it is possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times.” *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 975 (1998). Although the Board now says its previous concerns about delineating specific standards are “far less pressing” because railroads can provide “more granular and timely service data,” NPRM at 7, the proposed standards are based on limited, highly aggregated data that are the result of calculations fundamentally different from the methodologies proposed by the NPRM. Union Pacific believes the Board chose the correct approach in 1998. However, if the Board

⁸ The NPRM would not address these customer behaviors because they are not listed among the proposed “affirmative defenses.” See NPRM at 41 (proposed § 1145.3).

⁹ “Order-in” customers must request service at least 12 hours before the local train is scheduled to depart from the yard and may not schedule delivery unless a car is already in a serving yard.

adopts a standards-based approach, the standards should be the result of careful study of the “granular” data now available and should be aligned to the data actually collected and provided.

II. The proposed rule can and should do more to encourage voluntary resolution of service issues.

The NPRM allows a five-day window for a customer to approach Union Pacific to negotiate a resolution. *See* NPRM at 41 (proposed § 1145.4). Practically, the customer is better served by having a meaningful opportunity to bring service issues to Union Pacific’s attention, and for Union Pacific to have an opportunity to address those concerns. The Board can better realize its stated objective of addressing service concerns by incorporating a longer, reasonable negotiation period. By requiring the customer to negotiate with the carrier for a longer period—such as thirty days—before filing the petition, the customer and the carrier will have the opportunity to find agreeable ways to resolve issues and make longer-term, permanent changes to address the concerns.

In the same spirit of encouraging resolution of service issues, the proposed rule should not allow a shipper to obtain a long-term remedy based on a service issue a carrier has resolved. The incumbent carrier should be able to defend against a petition brought under the new rule by showing that the carrier has resolved the issue giving rise to the petition.

III. The proposed rule does not adequately address the burdens imposed on alternate rail carriers.

The NPRM says almost nothing about the role of the alternate carrier.¹⁰ The Board does not clearly state whether it believes it could, or whether it intends to, require an unwilling

¹⁰ It is not clear whether the Board could *legally* require an alternate carrier to participate in reciprocal switching.

alternate carrier to participate in reciprocal switching.¹¹ As a potential alternate carrier, Union Pacific is concerned the proposed rule would not provide sufficient time to determine whether it could safely provide service and how the new service would fit the network, including its ability to serve its existing customers without impairing its operations. Union Pacific is also concerned the proposed rule might require it to expend significant resources to accommodate traffic the shipper could leave with the incumbent carrier. The Board should not adopt a new rule without addressing the burdens the rule would impose on potential alternate carriers.

A potential alternate carrier would have almost no time to evaluate whether it could provide alternative service safely and effectively. Under the proposed rule, Union Pacific might not learn it is being considered as an alternate carrier until it is served with a petition for prescription of reciprocal switching, at which point it would have only 20 days to reply. *See* NPRM at 42 (proposed § 1145.5(d)). By contrast, under the Board’s existing rule providing for temporary prescription of alternative rail service, the shipper must approach the potential alternate carrier sufficiently in advance of filing its petition to obtain a “commitment . . . to provide alternative service.” 49 C.F.R. § 1147.1(b)(1)(iii).

As a practical matter, 20 days often will not be enough time for Union Pacific to evaluate the impact of providing alternative service on its operations and its ability to serve its current customers. Some cases might simply involve adding cars to existing trains that plainly have capacity. Most situations are likely to be more complicated. Typically, Union Pacific begins

¹¹ *Compare* NPRM at 29 (discussing the need to make alternative service “reasonably attractive to potential alternative carriers”), *with id.* at 42–43 (proposed § 1145.6(b), suggesting alternate carrier would need to prove switching service could not be provided without “unduly impairing its operations” or its “ability to serve its existing customers”); *see also* 49 U.S.C. § 11123(a)(1) (addressing circumstances in which the Board may “direct the handling, routing and movement of the traffic of a rail carrier and its distribution over . . . other railroad lines”).

communicating with potential new customers long before their shipments would start moving by rail. Union Pacific's processes for evaluating the impacts of potential new business and planning to handle such business involve careful evaluation of existing service and resources to determine whether the traffic can be folded into existing operations or whether Union Pacific must make operational changes or investments—for example, changing train schedules, hiring new crews, acquiring additional rail cars, or investing in new infrastructure. New business has the potential to impact the service product for current customers, and understanding the impact is crucial to being able to provide safe, reliable, and consistent service for all rail customers. The evaluation process takes time and resources, not to mention the potentially complicated discussion with the incumbent carrier to identify workable interchange procedures. Even if Union Pacific could complete the necessary evaluation in 20 days, reciprocal switching petitioners would be essentially cutting in front of other potential new customers, by delaying Union Pacific's ability to respond to requests already received from other customers.

Under the proposed rule, a shipper that obtains prescribed reciprocal switching would not be required to give a single carload of traffic to the alternate carrier. The alternate carrier could be dragged into a proceeding, forced to expend its resources on an expedited service analysis—and perhaps even be required to change its service plans, hire new crews, acquire additional rail cars, and invest in new capacity—only to have the petitioner leave its business with the incumbent carrier. Nothing in the NPRM acknowledges, much less justifies, imposing such uncompensated costs on alternate carriers.

The Board could address the burdens imposed on potential alternate carriers by taking one simple step: require a shipper to obtain a commitment from an alternate carrier to provide alternative service before it can file a petition for relief—the same requirement contained in

49 C.F.R. § 1147.1. Such a “commitment requirement” would incentivize shippers to give potential alternate carriers sufficient time to evaluate the impacts of providing the requested service. Requiring the shipper to obtain a commitment from the alternate carrier also addresses the uncompensated-cost issue: the alternate carrier and shipper can negotiate an agreement for services and volume expectations.

Alternatively, the Board could make clear it would not require a potential alternate carrier to provide alternative service if the carrier would have to change its service plans, hire crews, or undertake capital investments. The proposed rule might implicitly incorporate this principle in proposed § 1145.6(b). Changing service plans, hiring crews, and constructing new infrastructure all take substantial time, often very substantial time—which would be inconsistent with the proposed rule’s remedial objectives. The Board could clarify its intent by modifying proposed § 1145.6(b) to state it would not require a potential alternate carrier required to provide alternative service if it would need to change service plans, hire crews, or undertake capital investments to provide or accommodate the alternative service.

* * *

The proposed rule depends critically on “alternate carriers.” If the Board moves forward with the proposed rule, it should do so only after more carefully considering and addressing the burdens the rule would impose on potential alternate carriers.

IV. The proposed rule does not adequately address the burdens Union Pacific would face to develop new data reporting technologies to implement the proposed rule.

In the NPRM, the Board estimates Union Pacific would need just 80 hours to “update” its “data collection software to standardize with the Board’s data definitions for service reliability and industry spot and pull.” NPRM at 50. As proposed, the rule does not address the time for

developing processes to comply with the new data reporting requirements, or the cost for implementing the new obligation for reporting the data to customers.

As discussed extensively in Part I of these comments, Union Pacific's current procedures for measuring on-plan performance, transit time, and industry spot and pull performance rely on different data logic than would be required under the proposed rule, and Union Pacific processes the data in different ways than would be required under the proposed rule. Union Pacific's current procedures were developed to provide information needed to effectively monitor and adjust Union Pacific's transportation performance while excluding events not associated with its transportation performance—*e.g.*, elapsed time between waybill tender and car release; bad orders and other similar en route delays; connecting carrier's schedules. Because the proposed rule would use standards different from those Union Pacific developed and uses to evaluate its performance in the ordinary course of business, Union Pacific likely would not "update" its existing data collection software; rather, Union Pacific would likely create altogether new systems to be used solely for Board reporting purposes. Union Pacific estimates that between one and two years would be required to complete the design, programming, and testing of such systems before they could be implemented, not the 10-person/days estimated in the NPRM.¹²

In addition, the NPRM's burden estimate does not accurately reflect the time required to design, program, test, and implement new methods for developing arrival-time estimates that would be consistent with the methods used to determine compliance with OETA standard. For example, as discussed in Part I, Union Pacific currently develops arrival-time estimates without

¹² Union Pacific questions whether the benefits of implementing the proposed rule could possibly outweigh even the erroneously low burdens estimated by the Board, especially considering the Board's estimate that the six Class I carriers would experience a total of only 5 petitions for relief per year—*i.e.*, less than one per carrier. *See* NPRM at 50.

having to consider the range of potential time gaps between a shipper's tender of a waybill and its release of the car. However, if the Board adopts the proposed rule, which would require Union Pacific to provide an arrival-time estimate when a shipper tenders a waybill, Union Pacific will need to determine how to account for the potential time gaps in its arrival-time estimates. Union Pacific will also need to determine how much time to build into its estimates to account for various en route events for which it currently "stops the clock." For traffic Union Pacific interchanges with another carrier, Union Pacific will need to determine how to account for the variability between the time it delivers a car in interchange and the time the connecting carrier takes physical possession of the car. Unless Union Pacific establishes methods for estimating arrival times that account for the methods used to determine compliance with the OETA standard, the OETA standard cannot serve its intended purpose. Establishing and testing new methods for developing arrival-time estimates would be a lengthy process.

To mitigate some of the burden associated with the proposed rules' new data reporting requirements, the Board should consider changing its rolling twelve-week approach to an approach based on the most recent calendar quarter. Collecting and processing the new data points necessary under the NPRM's proposed data reporting requirements would be substantially simplified by quarterly reporting approach, rather than an approach that allows customers to select any consecutive twelve-week period for review.

* * *

The NPRM does not address how long railroads would have to implement the new rule, assuming the new rule is adopted. In light of the extensive burdens involved in developing new

systems and methods to implement the rule, Union Pacific proposes the Board establish a one-year implementation deadline, subject to extension for good cause.¹³

Respectfully submitted,

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¹³ As a practical matter, Union Pacific believes the transit time standard could not be fully implemented until one year and 12 weeks *after* the initial system and method changes are made, because any year-over-year comparison of transit time data drawn from a 12-week period would need to be based on data developed and collected using the same system and methodology.